Witnesses—Limitation of Number of Witnesses as Prejudicial Error.—In State *v.* Randall, 173 N. W. 425, the Supreme Court of Minnesota held that it was prejudicial error to limit defendant's witnesses to twelve of the twenty-seven he had produced to testify on the main issue of his defense.

The court said: "The authorities seem to be in accord on the proposition that the trial court may in the exercise of sound judicial discretion limit the number of witnesses as to any collateral fact or as to a given point in criminal as well as in civil cases (State *v.* Beabout, 100 Iowa 155, 69 N. W. 429; People *v.* Casselman, 10 Cal. App. 234, 101 Pac. 693, character witnesses; Commonwealth *v.* Thomas, 104 S. W. 326, 31 Ky. Law Rep. 899, character witnesses; State *v.* Bowerman, 140 Mo. App. 410, 124 S. W. 41, on impeachment of witnesses; State *v.* Lamb, 141 Mo. 298, 42 S. W. 827, upon alibi). In Sheppard *v.* State (120 Ark. 160, 179 S. W. 168) the court said it was within sound judicial discretion to limit the number of witnesses as to a particular fact, and to decide at what point to stop the introduction of cumulative evidence. We find no case holding squarely that on the main issue the court may limit the number of a party's witnesses, unless it be in Butler *v.* State (97 Ind. 378, a murder charge), where it is said:

"'If the court had no discretion in such cases, then the case might be indefinitely delayed and an unlimited number of witnesses called. But for this rule courts would be subject to the caprice of counsel, and public good would * * * suffer. We agree that this discretion should be so exercised as not to impair the rights of a defendant; nevertheless it does exist. But as the power is a discretionary one, an appellate court can only interfere where it has been abused. If we can say from the record that the discretion has been abused, then we should review the ruling and reverse the judgment. This we cannot say, for the number of witnesses was limited to 45, and this, in itself, was not an unreasonable limitation.'

"It may, however, be said that it does not clearly appear from the case as reported whether this restriction of the number of witnesses applied to those who could testify regarding the main issue. In Mergentheim *v.* State (107 Ind. 567, 8 N. E. 568), a prosecution for maintaining a canal so as to constitute a nuisance, the court followed Butler *v.* State (supra) and held it proper exercise of judicial discretion to limit the number of witnesses as to the odor and condition of the canal. It was fixed at 7. The syllabus in Samuels *v.* United States (232 Fed. 536, 146 C. C. A., 494, Ann. Cas. 1917A, 711) states:

"'It is within the discretion of the trial court to limit the number of witnesses of a defendant charged with criminal offense may introduce on a single point in issue, and unless it appears clearly that there has been an abuse of discretion, which was prejudicial

to defendant, an appellate court will not consider it cause for reversal.'

"That was a prosecution for using the mails to defraud, the particular fraud consisting in advertising a worthless remedy as a cure-all, there-by obtaining money by misrepresentations. After the defendant had produced 35 witnesses, who testified that they had been cured of different ailments by the use of his preparation, the court announced that only 6 more would be permitted to testify along that line. The court said that at best the evidence was merely cumulative, and it was discretionary whether more than forty-one should be allowed to testify. In re Winslow (146 Iowa 67, 124 N. W. 895, Ann. cas. 1912B, 663) might also be cited as supporting the proposition that on the main issue the number of witnesses to be heard is discretionary with the trial court. These four cases are the only authorities which might tend to sustain the rule which the learned trial court conceived to be applicable, namely, that it rested within his discretion to limit the number of witnesses. But it is to be noted that had the limitation of the number of witnesses in the instant case been near as generous as in the Butler or Samuel cases defendant would have had no occasion to complain.

"However, the weight of authority is to the effect that in neither a criminal nor in a civil case is it within the province of the court to limit the number of witnesses which a party may offer to prove or disprove the main issue or a controlling fact. In People *v.* Arnold (248 Ill. 169, 93 N. E. 786), a rape case, the court limited the character witnesses to twenty-five, and it was said:

"'The court fixed that limit for each side, and while a court has no power to limit the number of witnesses to be heard as to a controlling fact or facts and circumstances bearing thereon, it is not error to fix a reasonable limit concerning collateral matters such as this was.'

"To the same effect is Green *v.* Phœnix Mutual Life Ins. Co. (134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576), where the court, speaking of this power, says:

"'Familiar illustrations of cases in which the discretion could not be exercised, where the inquiry is single, as in cases of right of way, the grant of a prescriptive right, the proof of custom or the identity of persons or property, which are disputed, will readily occur to any one.'

"The trial court restricted the defendant in a slander case to ten witnesses to prove plaintiff's reputation. This was held error in Ward *v.* Dick (45 Conn. 235, 29 Am. Rep. 677), the opinion saying:

"'The subject of the inquiry was the value of a reputation. To the law this is a tangible thing; it is properly in the highest sense, and we are not aware that in actions for injuries to property courts have assumed the right, either to prevent the plaintiff from estab-

lishing the value thereof at the highest possible point to which he could carry it by the power of testimony, or the defendant from diminishing it by the same means; and actions for injuries to character are not exceptions.'

"In St. Louis, M. & S. R'y *v.* Aubuchon (199 Mo. 352, 97 S W. 867, 9 L. R. A., N. S., 426, 116 Am. St. Rep. 499, 8 Ann. Cas. 822) strong reasons for not restricting the number of witnesses on the main issue are stated in the vigorous and characteristic language of Justice Lamm. In Barhyte *v.* Summers (68 Mich. 341, 36 N. W. 93) a new trial was granted because the court limited the number of witnesses upon a vital issue—the soundness of a horse claimed sold under misrepresentations. This case is approved in the later one of Sulkowski *v.* Zynda (160 Mich. 7, 124 N. W. 536, 136 Am. St. Rep. 414). In a case involving the quality of paint purchased, plaintiff desired to take the deposition of 250 witnesses; defendant petitioned to reduce the number, but the court denied the petition (Carrara Paint Agency Co. *v.* Carrara Paint Co., C. C. 137 Fed. 319. See also Jones on Evidence, §§ 814 and 900, and cases collected in 8 Ann. Cas. 828).

"We approve of the rule that upon the vital controverted issue in a case the trial court should refrain from any attempt to limit the number of the witnesses that a party may offer, unless a purpose to trifle with the administration of justice becomes apparent."